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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 19 OF THE CONVENTION

Second periodic reports of States parties due in 1992

Addendum

SWITZERLAND*

[24 September 1993]

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* The initial report submitted by the Government of Switzerland is contained in document CAT/C/5/Add.17; for its consideration by the Committee, see documents CAT/C/SR.28 and 29 and the Official Records of the General Assembly, forty-fifth session, Supplement No. 45 (A/45/44), paras. 87-114.

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Introduction

1. On 2 December 1986, Switzerland ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention entered into force for Switzerland on 26 June 1987. Switzerland submitted its initial report (CAT/C/5/Add.17 - hereafter referred to as the "initial report") on 14 April 1989. This report was considered by the Committee on 15 November 1989 (CAT/C/SR.28 and 29).

2. The present additional report of Switzerland covers the period from 1 July 1988 to 30 June 1992.

3. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) made its first visit to Switzerland from 21 to 29 July 1991. It visited various places of detention in the Cantons of Berne, Zurich, Vaud and Geneva. Its report, dated 7 February 1992, was transmitted to the Swiss authorities on 5 March 1992. The Swiss Government took cognizance of this report. The federal authorities have questioned the cantons visited concerning certain observations made by the CPT. At its session on 14 December 1992, the Federal Council defined its position on this question and made it publicly known on 25 January 1993. These two important documents are annexed to the present report.* They illustrate the determination of the Confederation to cooperate in a very practical manner with the CPT with a view to even more effective protection of persons deprived of liberty against torture and inhuman or degrading treatment or punishment.

4. As regards the legal provisions and remedies which in Switzerland protect the individual against torture and other cruel, inhuman or degrading treatment or punishment, reference should be made to paragraphs 1-32 of the initial report, which are still valid, subject to the further information and details given below.

I. INFORMATION ON NEW MEASURES AND DEVELOPMENTS CONCERNING IMPLEMENTATION OF THE CONVENTION

Article 2

5. During the period under consideration, several petitions were lodged with the European Commission of Human Rights against Switzerland for violation of article 3 of the European Convention on Human Rights. About 10 of them were ruled inadmissible by the Commission, which did not inform the Swiss Government, which in turn was not called upon to take a decision. Three were ruled inadmissible by the Commission after it had taken cognizance of the views of the Swiss Government. Two further petitions were ruled admissible and are currently being considered by the Commission.

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* These documents may be consulted in the files of the United Nations Centre for Human Rights.

6. For the rest, the information provided in paragraphs 34-37 of the initial report is still valid.

Article 3

7. By way of introduction, reference should be made to paragraphs 38-41 and 43-44 of the initial report.

8. No decision on extradition by the competent authorities was rescinded by the Federal Court during the period under consideration. When extraditions entailing a risk of violation of human rights have been effected, they have been made subject to a guarantee by the requesting State that the rights of the person to be extradited will be respected. In one case, in 1980, the requesting country did not abide by its undertakings. Since then this country has never again requested Switzerland to undertake an extradition. If such a case were to recur, it would be treated with the greatest circumspection and in all likelihood the request would not be granted.

9. Swiss policy on asylum is conducted in accordance with the principles of international customary law and with international conventional law (see art. 3, European Convention), in conformity with the Federal Act on Asylum of 5 October 1975. This Act has been amended by a federal decree which entered into force on 22 June 1990. Thus, the competence to decide whether to grant or refuse an application for asylum and whether or not to send back a person of foreign nationality lies with the federal authorities, while execution of the decision to send them back is the responsibility of the cantonal authorities.

10. The amendments introduced spell out in greater detail the conditions in which return may not be authorized, namely "when it is not possible, when it is unlawful or cannot reasonably be required". The decree establishes equality of treatment for all aliens ordered to leave Switzerland. It stipulates that return shall be ordered in the case of persons who cannot be considered as refugees within the meaning of the 1951 Convention relating to the Status of Refugees or refugees who can no longer invoke grounds for non-return (1951 Convention, art. 1, C (5)) and all aliens whose authorization of residence has lapsed and who have to leave Switzerland, only when execution of the said decree does not violate the customary principle of non-return also established in article 33 of the 1951 Convention, article 3 of the European Convention and article 3 of the Convention against Torture.

11. When they examine whether return to the country of origin may be executed, the Swiss authorities also take into consideration the situation which the alien would encounter in that country. If it appears that return is possible under international law but not possible because of humanitarian considerations, the alien is not sent back and is provisionally admitted into Switzerland.

12. When an alien lodges his application for asylum at an airport, the authorities first ascertain whether it is possible to send him to a safe country where he has already lived or with which he at least has close links. If this is not possible, he is sent directly to his country of origin if,

after thorough consideration of his case, it is apparent that, in the opinion of both the Federal Office for Refugees and UNHCR, he is manifestly not under threat of persecution in that country.

13. The 1990 decree also established the authority not to consider an application for asylum when certain specific conditions are fulfilled. It should be made clear that every asylum-seeker is heard by the competent authorities even if his application meets the legal conditions for non-consideration. He has the possibility of making known his personal situation and the grounds for his application. Thus if, following the hearing, there are strong indications that he will be subject to persecution within the meaning of the Convention relating to the Status of Refugees, the European Convention or the Convention against Torture, detailed consideration is given to the question whether return is admissible, whether it may reasonably be required and whether it can be executed. During the hearing, the specific situation in the State of origin is taken into consideration, particularly in the case of States where torture is known to be practised. If return is not possible, the alien is provisionally admitted into Switzerland. Against the application of this rule, it is sometimes argued that, at least in some cases, insufficient consideration is given to the material conditions of return, particularly because of the shortcomings of the hearing with regard to possible threats of torture to which the applicant would be exposed on his return to the country in question. It is also claimed that insufficient account is taken of the psychological and language difficulties which may prevent the torture victim from expressing himself at a first hearing. As has already been explained, however, the competent authorities take particular account of these factors when examining an application. The applicant obviously has the right of appeal against a decision not to consider his application.

14. It is possible not to consider an application for asylum when the applicant's country of origin is considered to be free of persecution. There again, the applicant is given the opportunity to express himself and his personal situation will be the subject of special study. The competent authority will not order the person concerned to be sent back if he is able to prove or establish the likelihood that he is threatened in his country of origin with persecution within the meaning of the Convention relating to the Status of Refugees or that he is in serious and specific danger within the meaning of article 3 of the European Convention or article 3 of the Convention against Torture. The inclusion, in the list of countries presumed to be free of persecution, of countries which do not offer sufficient guarantees in this respect is sometimes criticized. This problem is nevertheless taken into account, in particular by giving the applicant two hearings, and the possibility of appealing against a decision not to consider the case on the basis of insufficient appreciation of the grounds for the application and thus securing suspension of execution of the decision. The Federal Commission on Appeals in Asylum Matters frequently grants such suspensions and also ascertains whether a State on the list is genuinely free of persecution.

15. It would appear advisable to state that, in accordance with a decision by the above-mentioned Commission of 22 June 1992 in a case in which it had been decided not to consider the application, the unsuccessful applicant is sent back only after a period of not less than 24 hours, in order to enable him to

leave the country freely or to appeal against the decision to the Commission, which is independent of the administration and whose decision is final. The brevity of this time-limit, which, it is alleged, does not allow effective appeals to be lodged, has been criticized. It should nevertheless be borne in mind that the purpose of the time-limit is only to enable the applicant to request a review of the question of the suspensive effect on the application, and so it is in general sufficient. The duration of the time-limit is currently being considered by a commission of experts in the context of the review of the right of asylum. It will thus probably be changed.

16. The practice of the Swiss authorities with regard to asylum endeavours to be in conformity with the principles of the European Convention on Human Rights and judicial decisions relating thereto (see those relating to art. 3). After every application for asylum, the applicant's personal situation is subjected to special scrutiny. He is sent back to the country of origin only when it has been impossible to establish that he is in personal and specific danger.

17. All the petitions submitted to the European Commission of Human Rights and ruled inadmissible after the Swiss authorities had transmitted their observations (see para. 5) concerned persons who had been the subject of a decision to send them back.

Article 4

18. By way of introduction, reference should be made to paragraphs 46-50 of the initial report.

19. During the period under consideration, several amendments were made to the Criminal Code and the Military Criminal Code. The amendments were the outcome of a comprehensive review of the two codes aimed at adapting them to the existing demands of criminal policy.

20. The first provisions revised concern offences against life, the person and the family, and entered into force on 1 January 1990. Among the most important provisions, which may concern acts of torture or other cruel, inhuman or degrading treatment or punishment, mention may be made of those governing bodily harm and endangering the life and health of others.

21. Thus, the old provision on abandonment of an injured person has been extended. The new provision establishes a general obligation to provide assistance and imposes penalties on any person who fails to assist a person in imminent danger of death or who prevents a third party from providing such assistance. The elements constituting an affray have also been expanded and supplemented by a new provision on assault.

22. It should also be noted that children and adults in need of assistance have been given better protection, which takes the form of ex-officio prosecution for repeated assault and bodily injury against these persons, and extension of the elements constituting the offence of supplying children with substances hazardous to their health. These amendments have rendered superfluous the previous provisions on ill-treatment and negligence of children, and overworking of children and subordinates.

23. The second provisions amended relate to sexual offences. These are aimed primarily at protecting young people and dependent persons, and entered into force on 1 October 1992.

24. Among the provisions of more particular relevance to this report, we would mention the provisions concerning rape. Following the introduction of a new definition of rape, any person of the female sex, whether married or not, may now be the victim of such an act and not just a woman over the age of 16. Homosexual rape, which is classified as another act of a sexual nature, carries the same maximum penalty of 10 years' imprisonment.

25. The old offences relating to procuring, pimps and incitement to vice have been merged into a single new offence, namely, furtherance of prostitution. This new provision provides increased protection for juveniles and other persons who are kept in a state of dependence and forced to engage in prostitution against their will.

26. A judge now has the possibility of imposing a heavier sentence when punishable acts of a sexual nature have been committed jointly.

27. The Military Criminal Code has also recently undergone revision, as a result of which all the provisions concerning the death penalty have been repealed. These amendments entered into force on 1 September 1992 and so there is now no act punishable by the death penalty in Swiss law.

28. At the international level, Switzerland has since 1987 been a party to Protocol No. 6 to the European Convention on Human Rights (of 28 April 1983) concerning the Abolition of the Death Penalty. And on 3 February 1993, the Swiss Government recommended to Parliament that our country should accede to the Second Optional Protocol (of 15 December 1989) to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. This Covenant, article 7 of which prohibits torture and cruel, inhuman or degrading treatment or punishment, entered into force for Switzerland on 18 September 1992, the same day as the International Covenant on Economic, Social and Cultural Rights.

Articles 5 and 6

29. The information provided by Switzerland in its initial report is still valid (paras. 52-54).

Article 7

30. The following may be added to the information provided by Switzerland in paragraphs 52-59 of its initial report.

31. During the period under consideration, several Swiss cantons amended provisions of their codes of criminal procedure. Generally speaking, these amendments are aimed at reinforcing the rights of defence and the rights of persons under pre-trial detention.

32. Thus, in the Canton of Schwytz the Code of Procedure which entered into force on 1 February 1989 guarantees increased protection of the defendant - in particular while being questioned by the police and in detention - and extends the rights of defence. In Saint Gallen, the provisions of the Code of Procedure relating to young offenders were amended in 1989 in order to provide improved treatment and attention more closely geared to the young person concerned. In Lucerne, the Code of Procedure which entered into force on 1 January 1990 improves the rights of persons detained pending trial and persons serving a sentence by further restricting the possibilities of illegal acts against them. In Solothurn, the Code of Procedure of 1990 defines more restrictively the conditions under which a person may be held in pre-trial detention, and the duration of such detention. In the Canton of Thurgau, the Code of Procedure of 5 June 1991 defines unlawful methods of interrogation and spells out the conditions of detention. In the Canton of Jura, the 1990 Code of Procedure, which entered into force on 1 January 1993, guarantees, by introducing adversarial examination, increased protection for the defendant and provides that such examination may be suspended only on an exceptional basis. In Zurich, the Code of Procedure of 1991 reinforces the rights of a person exempt from criminal responsibility by providing that special measures or treatment in respect of that person must be ordered by a court, and not, as was previously the case, by the examining magistrate when he orders the cessation of proceedings. And in Valais, the Code of Procedure of 1992 more specifically reinforces the right of defence at the stage of the preliminary investigation and preparatory examination.

33. Other cantons, including Aargau and Berne, are currently in the process of revising their codes of criminal procedure.

Articles 8 and 9

34. The information provided by Switzerland in its initial report is still valid (paras. 60-63).

Article 10

35. The information provided by Switzerland in paragraphs 69 and 70 of its initial report should be supplemented by mentioning (a) the scope in Swiss law of the European Penitentiary Rules, referred to in the aforesaid paragraph 69, and (b) the new measures taken by the cantons concerning the training of prison personnel.

36. The Federal Court, our Supreme Court of Justice, considers that the European Penitentiary Rules (of 12 February 1987), known as the "minimum rules", have the same scope as the recommendations issued by the Council of Europe. Although these rules are not directly applicable in Swiss law and do not establish any subjective duty or right, their violation nevertheless constitutes an infringement of the constitutional rights of citizens or of an obligation deriving from an international treaty. Considered as the expression of the common will of the States members of the Council of Europe, they assist the judicial authorities in interpreting constitutional rights and the European Convention on Human Rights. They contain important guidelines relating to modern prison practice which respects the fundamental principles of human dignity and the detainee's minimum right to personal freedom. These

standards reflect the policy on criminality of the States members of the Council of Europe. They are addressed particularly to the political authorities of the Confederation and the cantons, which are called upon to incorporate these recommendations in their legislation - in particular, in their codes of criminal procedure and prison regulations - and to ensure their proper implementation.

37. Concerning the measures taken by the cantons, we are able to give the following information.

38. In a circular of 8 February 1990, the Department of Justice of the Canton of Lucerne drew the attention of the judicial authorities and prison personnel to the provisions of the Convention under consideration.

39. On 30 April 1991, the government of the Canton of Jura issued a new order on detention establishments, which was supplemented by regulations dated 24 September 1991. The new order requires warders to take the courses given by the Swiss Centre for the Training of Prison Staff.

40. In the Canton of Zurich, the authorities have set up a consultation service to provide psychiatric and psychological care for detainees. Medical personnel, and all other personnel working in prisons, take the training courses established at the national level.

41. The Vaudois prison authorities have established, in addition to the basic training provided at the national level, continuing training for the personnel of prisons and detention centres situated in that canton. These establishments are also used as places for the enforcement of penalties by neighbouring cantons.

Article 11

42. The means of review referred to in paragraph 71 of the initial report are still in force.

43. However, some cantons have amended a number of regulations concerning prison establishments, bringing them into line with the new international standards. Thus, on 16 May 1990, the Canton of Valais enacted new legislation for the enforcement of the Swiss Criminal Code establishing a commission for pardons and supervision of prison establishments. One of its responsibilities is to visit persons detained in prison establishments in Valais and detainees who have been tried in Valais and sent to prisons in other cantons, in order to supervise the performance of their obligations, respect for their rights and conditions of imprisonment.

44. Several cantons, notably Jura, Vaud and Saint Gallen, have begun construction or conversion work on their cantonal and local prisons. The latter are used as places of pre-trial detention or for the enforcement of short prison sentences.

45. A few cantons, in particular Valais and Schwytz, have begun work on the refurbishment and construction of police stations in order to bring them into line with the minimum rules of the Council of Europe.

Article 12

46. The information contained in paragraphs 72 and 73 of the initial report is still valid.

47. During the period under consideration, the judicial authorities of some cantons dealt with several complaints concerning alleged violations of the European Convention on Human Rights. It is not, however, possible to indicate the number or nature of these complaints since cantons do not keep statistics on this subject.

48. We are aware of only a few cases which have concerned the courts. In most of these cases, proceedings were dismissed. They mostly related to the enforcement of federal legislation on asylum and some were the subject of a petition to the Commission of Human Rights in Strasbourg (see para. 5).

Article 13

49. The following should be added to the information provided in paragraph 74 of the initial report.

50. As indicated in paragraphs 18-26 above, acts constituting offences in accordance with the Convention under consideration are punishable under Swiss law. The various cantonal codes of criminal procedure enable any person who claims to have been a victim of such an act to lodge a complaint and also give him the possibility of bringing criminal indemnification proceedings.

Article 14

51. The information provided by Switzerland in its initial report is still valid (paras. 76-78).

52. In order to be able to ratify the European Convention on the Compensation of Victims of Violent Crimes, which Switzerland signed on 15 May 1990, Parliament on 4 October 1991 adopted a new Federal Act on Assistance to Victims. This Act entered into force on 1 January 1993; its chief characteristics are as follows.

53. It places the cantons under an obligation to ensure that private or public consultation centres are available to victims. These centres, which are accessible 24 hours a day, are required to provide - if necessary by making use of the services of outside personnel - medical, psychological, social, material or legal assistance, on a single occasion or on a continuing basis, and information on the assistance itself. The Swiss Confederation has undertaken to contribute to the financing of the establishment of such centres and to the training of their personnel.

54. The Act contains important provisions aimed at protecting the personality of the victim by prohibiting publication of his identity and, as far as possible, preventing contact between the victim and the perpetrator of the offence. Victims also have the right to be accompanied at hearings and to

refuse to answer questions of a private nature. In addition, victims of sexual offences have the right to be heard, during the police investigation, by persons of the same sex as themselves.

55. The Act further guarantees the victim better information on his rights and the conduct of proceedings. It accords him certain rights of action and appeal in cantonal criminal proceedings. By limiting the possibility - frequently used by the judicial authorities for criminal matters - to order victims to appear before the civil courts for the purposes of a decision on civil claims, the Act enables them to have their civil claims recognized more easily in the context of the criminal proceedings and thus to avoid the distressing experience of new judicial proceedings.

56. When it is impossible for the victims to receive sufficient compensation from the person who committed the offence or under an insurance policy, the Act provides for compensation of the victims by the State.

57. Apart from the amendments to the cantonal codes of criminal procedure, the Criminal Code and the Military Criminal Code, the new Act has, in particular, required the establishment of consultation centres, and for this reason it has not entered into force earlier. The European Convention on the Compensation of Victims of Violent Crimes was ratified on 7 September 1992 and entered into force for Switzerland on the same date as the new Act.

Articles 15 and 16

58. Reference should be made to paragraphs 79-82 of the initial report which are still valid.

II. ADDITIONAL INFORMATION REQUESTED BY THE COMMITTEE

59. The Committee did not request any additional information.

III. OTHER MEASURES TAKEN AT THE INTERNATIONAL LEVEL

60. The 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment supplements and reinforces the 1984 Convention against Torture by establishing, at the regional level, a preventive system for the protection of persons deprived of liberty, based on visits to places of detention by an international committee.

61. Switzerland considers that the 1984 Convention against Torture could also be reinforced at the global level by machinery similar to that of the European Convention. For this reason it has for many years supported the draft optional protocol to the Convention against Torture (E/CN.4/1991/66). It has provided financial support for promotion of the draft since 1986 and participated directly in the drafting of the present text in 1990. In addition, it has been at the origin of and co-sponsored all the decisions relating to the draft taken by the Commission on Human Rights, including the most recent, resolution 1992/43, which established an open-ended working group to formulate a draft optional protocol.

62. This draft provides for the establishment of an international committee of independent experts subordinate to the Committee against Torture which would be able, at any time, to visit any place where detainees are being held by a public authority. Apart from its preventive effect, such a mechanism would lay the foundations for cooperation between the authorities of the country visited and the international committee of experts, and would in that respect act as a confidence-building measure. The recommendations made by the committee would in principle be confidential. The idea would be not to hold a country up to public indignation, but to offer it advisory and technical-assistance services as part of overall action to combat torture.

63. The Working Group on the Draft Optional Protocol met for the first time in October 1992 in Geneva, and the results of that first session are promising (see E/CN.4/1993/28). We hope that the Group's work will be completed as soon as possible and that it will enable the Commission on Human Rights rapidly to adopt an effective instrument for the prevention of torture. It is high time to take action, as the numerous measures already taken by the United Nations in this area are not sufficient: the absolute prohibition of torture in international law, the 1984 Convention against Torture, the Special Rapporteur on torture, the relevant advisory-services programmes and, of course, the Fund for Victims of Torture do not enable sufficiently effective action to be taken to combat this scourge.

64. Switzerland, which actively supports all these measures in political, diplomatic, legal and financial terms, considers that only concerted action by the international community against torture at three levels (prevention, punishment of acts of torture and due compensation of the victims of these practices) will enable this scourge to be tackled with any degree of effectiveness.

List of annexes*

1. Report of the Swiss Federal Council relating to the visit by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

2. Position of the Swiss Federal Council on the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, prepared following the visit it made to Switzerland from 21 to 29 July 1991.

3. Federal Decree on asylum procedure, which entered into force on 22 June 1990.

4. Amendments to the Criminal Code and the Military Code which entered into force on 1 January 1990.

5. Amendments to the Criminal Code and the Military Code which entered into force on 1 October 1992.

6. Federal Act on Assistance to Victims of Crimes, which entered into force on 1 January 1993.

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* These documents in French, which have been received from the Swiss Government, may be consulted in the files of the United Nations Centre for Human Rights.